COLUMBIA'S REPLY REGARDING ATTORNEYS' FEES UNDER 35 U.S.C § 285

EXHIBIT V

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK	)	
v.	)	Civil Case No. 3:13CV808
NORTONLIFELOCK INC.	)	April 7, 2022

COMPLETE TRANSCRIPT OF FINAL PRETRIAL CONFERENCE
BEFORE THE HONORABLE M. HANNAH LAUCK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Dana D. McDaniel, Esquire
John M. Erbach, Esquire
Spotts Fain PC
411 E. Franklin Street, Suite 600
P.O. Box 1555
Richmond, Virginia 23218-1555

Garrard R. Beeney, Esquire
Dustin Guzior, Esquire
Christopher A. Graham, Esquire
Alexander N. Gross, Esquire
Jessica Ecker, Esquire
Sullivan & Cromwell
125 Broad Street
New York, New York 10004-2498

Counsel for the Plaintiff

DIANE J. DAFFRON, RPR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

APPEARANCES: (Continued)

Dabney J. Carr, IV, Esquire
Troutman Pepper Hamilton Sanders LLP
1001 Haxall Point
Richmond, Virginia 23219

Nathaniel A. Hamstra, Esquire
Quinn Emanuel Urquhart & Sullivan
500 Madison Street
Suite 2450
Chicago, Illinois 60661

Melissa Sherry, Esquire
Susan Tull, Esquire
Douglas Lumish, Esquire
Richard Lowry, Esquire
Latham & Watkins

Counsel for the defendant

her to be heard. And I don't believe she can be here tomorrow. And so I'd love to take advantage of her expertise and wisdom on that issue. Other than that, we're happy to follow whatever process Your Honor thinks is so most efficient.

THE COURT: I don't want to prevent you all from giving your argument. And normally I am ready to rule, and I've just moved these around more than normal, and I want to give you an opportunity to look at them, too. But I'm aware that you all prepared for today, and I apologize for that.

MR. GUZIOR: And, Your Honor, I think we would just have a couple of issues on the verdict form that we want to make Your Honor aware of, because there are significant errors, we think. But, otherwise, we'd be happy to wait until you issue your proposed instructions and address them tomorrow or whenever works for opposing counsel.

THE COURT: All right. Well, why don't we speak to Mr. Dossier, the missing witness instruction, and then we can decide how to proceed from there.

MS. SHERRY: Thank you, Your Honor.

THE COURT: Now, with respect to argument, if you're going to go present an argument, I think go ahead and approach. I just told you otherwise, so --

MS. SHERRY: I'm much more comfortable standing at the podium. So thanks for that.

THE COURT: Sure.

MS. SHERRY: Good morning. Melissa Arbus Sherry from Latham on behalf of Norton.

So, you know, we fully appreciate that you have ruled that you are going to give a missing witness instruction, but that was in the context of the motion in limine. It was at a time where there was no specific jury instruction before the Court. It was before Quinn withdrew from representing Dossier. And I think maybe, most importantly, it was at a time where I don't think the Court had the model jury instruction before it. And I do think that model jury instruction is really significant not just for what the actual instruction is, but maybe even more than that, from the caution that comes underneath it.

THE COURT: Now, I'm going to -- I'm sorry. I'm going to interrupt you, but we have Quinn attorneys here. So is Quinn still participating?

MS. SHERRY: I believe there's a difference between -- he's is no longer representing Dossier.

THE COURT: I'm sorry. I thought --

MS. SHERRY: Sorry.

THE COURT: I thought you said he was no

longer representing Norton.

MS. SHERRY: No, I'm sorry. On March 28, I believe a letter was filed with the Court that Quinn is no longer representing Dr. Dossier.

THE COURT: I misheard you. I thought you said Norton.

MS. SHERRY: And so I think the model jury instructions are really significant. If you look at the model instructions, a couple things really stand out. Underneath the instruction itself, there is a caution. It is in all caps, and it says, "This instruction shall rarely be given."

We've looked through the model instructions. I believe that caution only appears at one other time in all of the 500-plus instructions. So I think that's quite significant.

The other thing you will see is at the end of that statement it will refer you to the alerts that come afterwards, and the alerts very much read like the objections that we filed with this Court. It relies heavily on what Justice Russell said in the *Harper* case in his concurrence. And what the committee focuses on is the fact that while this instruction has a long pedigree, it comes out of the days of trial by ambush, and it basically has outlived

its purpose.

And what the committee also says in the alert is that this is proven ripe for reversal by the appellate courts. And so we think that alert's significant.

The other thing I'd point out, and I haven't quite pinned down exactly when that alert included that language, but --

THE COURT: So, I can tell my court reporter is leaning in. That means you're talking quickly.

MS. SHERRY: Oh, okay.

THE COURT: Slow down a little bit, please.

MS. SHERRY: That's a good clue.

So I haven't figured out exactly when that alert language changed, but it's recent. It's after 2018 that they, you know -- it always had the cautionary language or at least has had that for sometime, but the really strong language in the alert is pretty new.

And then looking at the case law, it has been a long time since a court has affirmed a missing witness instruction when applying Virginia law. The most recent one I've seen is 2013. So nearly a decade ago. And that's the *Scott* case, and we can talk more about that decision.

But looking at the Virginia Supreme Court decisions, and you can go back four decades, maybe even more before you find an affirmance, the ones that are most often cited, *Harper*, *Banks*, those are all cases saying that there should have been no missing witness instruction.

And so I think that is really significant. I guess it raises the question, number one, should the instruction ever be given. I think there's a good argument that the answer today is no. But at the very least, we know that it should be a very rare occurrence. And, you know, this is not that rare a case. And it's not so rare a case for a couple of different reasons, any one of which, on its own, I think, would be a reason not to give the instruction. But, certainly, looking at them collectively, I do think it would make this an unprecedented use of a missing witness instruction.

So, the first thing I would point the Court to, and I know you are quite familiar with it, but the 2014 deposition testimony. And so you have a situation where Columbia is asking to give this instruction about the witness being missing immediately before playing the testimony of the missing witness.

That is, you know, a significant difference, and it's a significant difference from other cases where there is no witness testimony coming in.

And I think it's also significant that whenever Dossier spoke of him coming to testify at trial, he was pretty consistent in saying that he's being asking to repeat, quote, unquote, repeat his 2014 testimony. That's in a number of different places in the record, but the two I'd point the Court to is the November 2019 emails. And then also the April 10, 2020 email talks about him coming to repeat his testimony.

Now, I know that obviously the 2004 deposition testimony didn't cover statements made after 2014, but there was ample opportunity for Columbia to supplement the record in that respect, to get an additional deposition, to fill in whatever the 2014 deposition didn't cover. Since at least October 2021, they were told that he would not be coming to testify.

As far -- you know, I don't think there's anything showing that they reached out to Quinn, that they reached out to this Court, that they sought to supplement it and provide an additional deposition that, you know, could be played to the jury and would

fill in that particular blank in the testimony. So there's that.

There's also the need for there to be a relationship, and not just any relationship, but this very unique relationship between the party and the witness. And I want to emphasize party because that really is the critical link here. I think in your motion in limine decision, you were very careful when you were talking about the acts that happened and walking through the facts in saying Norton's counsel, or Quinn specifically, and I think you can go through your decision, and you say -- you talk about the actions, the interaction between Quinn and Dossier being peculiar. You talked about the email being from counsel by Norton that Quinn exerted improper control over Dossier, that there was gamesmanship by Quinn, that Quinn rendered the defendant unavailable, and there was only one conclusion that could be reached, and I think that is an important distinction, because what the cases are looking at is whether there's this very unique control relationship between the party and the witness, certainly not between party's counsel. And I think blurring that line and imputing counsel's action in these circumstances to Norton really results in a bit of a mismatch between the findings Your Honor

made and the remedy, the idea that there would be a missing witness instruction that would go against the party, would go against Norton.

THE COURT: So isn't it the case, though, that there were Norton employees and representatives who were made aware of this issue going on, right? It was a Norton person who ignored the email twice and then received it, right?

MS. SHERRY: Well, I think your first point is right. It was sent in November 2019 to a Norton representative. As you note, there is no response to that in the record. But I think the things that Your Honor focused most on, at least in the motion in limine decision, were the conflict that you found. And, of course, it's the conflict of counsel between having both representations going on at the same time. And so I think there really is some tension in imputing a conflict to one of the two clients.

But then the other thing I think you pointed to was a more recent email reporting out on Your Honor's decision, and when you spoke about that, you know, it was coming from Norton's counsel, I don't believe there was anyone from the company on that email chain.

THE COURT: So you're saying Mr. Erwine

doesn't represent Norton? He's done an awful lot for it.

MS. SHERRY: No. Obviously, he -- I mean, obviously, they -- Quinn represented Norton.

THE COURT: I'm talking about you're saying that that email, the later email, goes against Quinn but not Norton, but he's Norton's counsel.

MS. SHERRY: You're talking about -- I'm talking about the same email. I think it's coming from Quinn, if we're talking about the more recent November, I think, 2021 email. And I will check myself on that, but I'm pretty sure that it's a correspondence between Quinn and Sullivan & Cromwell about Your Honor's order. And so I do think there's an important distinction here --

THE COURT: So wait. I don't think you understand my question.

MS. SHERRY: Sure.

THE COURT: It is from Quinn.

MS. SHERRY: It is, yes.

THE COURT: It is from Quinn and it's to Columbia counsel.

MS. SHERRY: Yes.

THE COURT: And it is about ongoing matters in this litigation.

MS. SHERRY: Yes.

THE COURT: And he says -- Mr. Erwine, I think, is who it is. He says, Yes, we've told them -- we've told him about the order and that the Court found that we represented him. But Mr. Erwine is not -- there's no -- I don't know what a proper phrase would be. There's no wall to him only representing Mr. Dossier. He's done depositions in this case.

MS. SHERRY: I think that goes directly to the conflict issue that you discussed in the motion in limine.

THE COURT: No, it goes to the fact that Norton has knowledge through their counsel that this is going on.

MS. SHERRY: But I guess I don't think knowledge is enough. I mean, just to get back to what the test is. You know, we're dealing with a rare instruction, and we're almost dealing with an even more rare portion of when the instruction should be given in these very unique circumstances where there's such a close relationship that the party, Norton, is actually exercising control over the witness.

And so, I mean, I think if we just look at the cases where courts have found that, and there aren't that many, there certainly aren't that many

recent ones, these are circumstances that are almost always either employer/employee relationships, current existing relationships between the parties, or it's actually the party itself.

And so I had mentioned *Scott* earlier. I think it's an important decision to look at, both because it's the only one applying Virginia law in recent years that has upheld it, but also just because of the facts of the case because --

THE COURT: Right. I know it's different. I know there's a difference.

MS. SHERRY: Okay. And so, you know, moving beyond that, I don't think the relationship here between Norton and Dossier is remotely close to what courts have found sufficient to find this level of unique control.

But the third point I would make -- so there's the fact that the deposition testimony is going to be played. It's a fact that the relationship here is not the type of relationship the courts have found to be sufficient. The third point I would make is there's no unfair surprise here. And I think if you look at the cases where instructions have been given, virtually every one has this element of literally like at trial, last minute surprise, where

it shows up on the party's witness list. Everyone thinks this person is going to be called. Sometimes the Court even thinks the party is going to be called. And lo and behold, they duck out during recess, or there's something along those lines that happens in these cases.

And, you know, that makes a lot of sense if you think about the origins of this rule. And this goes back to, you know, what's talked about in the model rules commentary itself --

THE COURT: Are you saying I should just sanction Quinn? Is that what you're saying? If I'm making a finding that there is improper conduct, which I have, are you saying Norton's in the clear, and I just sanction Quinn? What do I do to Quinn? Is this any kind of discovery violation? Is this something that comes under any Rule 30 issue that would go against Norton or are you just saying I need to sanction Quinn?

MS. SHERRY: I'm saying -- and, you know, obviously, I'm not here representing Quinn, and they, you know, may have something to say about it, but I am here representing Norton. And I think the improper conduct you found, I think whatever it is, the remedy cannot be a missing witness instruction, whether it's

a sanction against Quinn, whether it's something else, I think I'll let others maybe speak more to that.

It's just there's a fundamental mismatch between the improper conduct that you found and the remedy of this missing witness instruction.

THE COURT: So you do need to address to me if it is the same person, if it is somebody who has represented Norton in depositions, and who is saying on Mr. Dossier's behalf that he's been told that he is represented by this same firm, it's the same person. How does that not go against Norton also? He's their lawyer, and he's saying it on their behalf.

MS. SHERRY: Well, maybe that latter part of the question is one of the key questions. I actually don't think it's the only question, but if Quinn is in this dual representation, joint representation, you know, I assume they would say that they're advising Dossier with respect to his testimony as his representative, as his personal representative. But I think, you know -- I don't think there is evidence in the record, and I think this is what you would need. I think you would need more than this, but I think you would actually need to be able to show that the party -- and especially in this dual representation context -- but that the party actually directed the

witness and had control over the witness in a way where the witness, you know, wasn't just going to say, you know, I'm going to do what I want but actually had that sort of control. I think that's why the only cases that tend to come up in this particular exception are where you're dealing with a current employer/employee. And what they said in the *Scott* case when it was a plaintiff, it's like that's the prototypical case. Of course, a plaintiff can decide whether or not he or she is going to testify.

And when you're talking about third party witnesses, like, there's a reason why this control idea is really narrow because, you know, especially in the modern era, the idea that parties control witnesses, you know, is a bit of a historic relic. And so there's a reason why it's very narrowly focused on circumstances where this is --

THE COURT: Well, tell me -- so tell me what I should do. If I don't give them a missing witness instruction, is it a discovery violation that deserves a sanction? Do I strike Quinn from the case because they improperly represented two parties and it's not Norton's fault, it's their fault, and I found a conflict?

So I'll tell you, the issue is there is a

serious, serious impression of gamesmanship, serious, which I found. Right?

MS. SHERRY: (Nodded head.)

THE COURT: Norton didn't care. Nobody cared about Mr. Dossier until he emailed Norton and said "I'm going to testify against you."

And then Norton's counsel contacted him and said, You can't testify, or we represent you for purposes of testifying, and then it's a black hole.

So Norton is in the mix. And it is the case that Mr. Dossier, I think, pretty inexplicably changed when he was not asking for counsel when his daughter, who's a lawyer said "You're not represented," and he was ready to talk.

So even if he was ready to talk about his repeat of 2014 testimony, he was ready to talk. And Dr. Keromytis says he was ready to talk about more. Right? So I'm taking that as the evidence I have in front of me.

I see that the emails say "repeat," but there's other emails that he's talking with other folks, and it is clear that he's not necessarily anticipating just the 2014 testimony. So I'm going to ask you to step away from that.

So the gamesmanship comes in when immediately

there's a motion for sanctions. There's a motion for sanctions against an attorney in my court for improper behavior talking to a represented party where the record couldn't be more clear that this attorney was trying to abide by every single rule. And then I put on notice that this is an issue. I wrote an opinion this is an issue.

And so you can say that Columbia had all the time in the world, but Norton had all the time in the world. Quinn had all the time in the world to clarify things. And no one brought him before me, but I essentially said there's a conflict. I was not going to make the finding without allowing folks to make their record. And Columbia didn't have the conflict.

So I want to hear from you what I should do. What is the repercussion? All of a sudden, he's not available. And then they say, Oh, yeah, he's not available for purposes of deposition, but, actually, you know, you have to get in touch with us. He's not our employee. Excuse me. He's not our employee. We don't have any control. We can't do anything with him except that you have to somehow contact the exact same firm, who is Norton's firm, to try to get in touch with him.

And there's no differential. It's not as if

they said, Why don't you contact Judge Lauck, because Judge Lauck, in our firm, is a person representing Dossier, right? That didn't happen.

MS. SHERRY: And, I mean, I don't want to relitigate all of that with you. That's not why I'm here today.

THE COURT: I know, but I'm --

MS. SHERRY: You want there to be --

THE COURT: Don't talk over me. What is the repercussion presuming there is a problem? What are you advocating? I want you to advocate what the remedy should be.

MS. SHERRY: I think the remedy should be -- I know what I think the remedy should not be.

THE COURT: No --

MS. SHERRY: I would like the opportunity to brief what the appropriate sanction --

THE COURT: You can't talk over. I want you to answer the question, not say "I don't want the missing witness instruction." I want you to say what do I do.

MS. SHERRY: Okay. I'm not trying to evade your question. I just don't want to commit to a position when I am not, you know, permanent trial counsel in this case. So I think there are a host of

measures that are available for the Court that it could take. There could be monetary sanctions.

THE COURT: Monetary sanctions against whom? Norton? Because you're saying Norton is not at fault. Why do I give sanctions against them?

MS. SHERRY: I think there could be sanctions against Quinn. When I say "Norton is not at fault," I'm focused on what the standard is for the instruction, that that is what I am talking about. I'm speaking about it in that context.

I understand that you made these findings of improperly conduct, and I think there's a number of things that the Court can do as a remedy for that, whether it's monetary sanctions, whether it's ordering a deposition. I think the critical point is that it shouldn't be a remedy that prejudices the jury.

THE COURT: I'm sorry, who? I didn't hear you.

MS. SHERRY: I think, you know, there could be sanctions. There could be depositions. There could be other sanctions, you know, things that this Court can do to remedy the misconduct, but I don't think it should be or can be something that would prejudice the jury in this way. And that is the primary concern.

And I know you made the point that I pointed out that, you know, Columbia could have contacted, and there's this sort of tough situation where it's this, you know, contacting Quinn who was representing both Norton and Dossier at this time. But when it comes to, you know, looking to see if there's a missing witness instruction, the fact that they could have asked Quinn and said, you know, we want your client Dossier to testify. We'd like you to ask him to testify. They could have come to this court in October, in November, in December.

THE COURT: I know that.

MS. SHERRY: And so -- and, again, I'm speaking really specifically to this instruction, but I think that's a really significant --

THE COURT: So I understand that you're speaking, Ms. Sherry, to this instruction, but it is happening within the context of the trial, right? And so -- it is. So what if I were to give the instruction, which is the model civil jury instruction, that if you believe that a party, without explanation, failed to call an available witness who has knowledge of necessary material facts, you may, but are not required, to infer that witness's testimony would have been unfavorable to the party who

failed to call the witness, right? Aren't you partially asking me to give that instruction?

MS. SHERRY: That is very much a -- if you disagree with us and overrule our objection that you shouldn't give any. So I just want to make that very clear. But yes, if we're in a world where you're going to give an instruction, the model instruction is the one to give.

The one additional point I'd make with that is when to give it.

THE COURT: Okay. We're not talking about timing. This is my issue with the question is that if it is the case that I am allowing in residual hearsay, but Dr. Dossier is not coming about saying what he is saying or is said to have said, not which I found is coming into evidence, isn't it possible that as that is phrased, it could run against Columbia because the party, without explanation, fails to call an available witness, which the jury doesn't know one way or the other, has knowledge of necessary material facts. They will have heard that Dr. Dossier had positive testimony for Columbia, and they didn't call him. So how would I --

You really don't have to say "I don't want you to give the instruction every time." I know that.

I know you don't want me to give the instruction at all. So just presume that when I ask questions that might involve something different, that I know you're not conceding that I'm going to give the instruction or that you want me to.

So with that foundation, tell me how the standard instruction could not be confusing if it is the fact that really what I'm saying is that Norton should have produced the witness.

MS. SHERRY: So I think what has happened, at least in the Virginia cases I've seen where they've given the instruction, maybe they haven't had to confront that, because it was, you know, even with the standard instruction, it doesn't specify it was obvious from who the witness was which party the inference was being taken against. If that's not obvious here, I think the question is what additional factual predicate or introduction to give the jury that is purely factual and doesn't leave the Court commenting on the evidence. I think that's the primary concern.

And so, you know, identifying who the witness is, I think, is a possibility, identifying the relationship that he is a former employee of Norton might be enough to do it. I worry that going beyond

those really basic facts would stray into commenting on the evidence, and that was, you know, our primary objection to the alternative proposed instruction that came from Columbia here.

THE COURT: Right. So I asked that question in part because I think it may drive -- and I'll tell you, I'm open not to giving the instruction in trial. I think that's unusual. So I'm open to that. But I believe, and I shouldn't impute what the other side might raise, but I believe that part of the reason that Columbia wanted it played then is so it was clear that when Dr. K testified -- I keep calling him Dr. K. I should call him Dr. Keromytis, I'm sorry. When he testified to what somebody else said, that it was not able for Columbia to bring that person, not that Norton -- there would be less of an implication that Columbia was failing to bring the witness. Do you understand that?

MS. SHERRY: I do.

THE COURT: So presuming the issue of the missing instruction, missing witness instruction, that, I think, is the concern about giving it in trial. And so -- and I want to give as close to a model instruction as possible, presuming I give it, and that would be my concern about giving this only at

the end.

MS. SHERRY: I understand that. I guess the concern with doing it in trial, besides the fact that it's not common, is there's a, you know, there's a confusion factor between, you know, saying this witness is missing and then playing the deposition testimony of that witness. And if it's just to give the context of who -- this is the difficulty, and this is what I'm struggling with. I think -- and I promise I'm not going back to say we don't want the instruction, but I do think the concern that underlies the instruction is to avoid having a situation where the Court is commenting on the evidence.

And so I think the courts have said either -- you know, I think Virginia courts actually have said it is important to maybe identify who the witness is because there can be circumstances -- I mean, here, like, there's other deposition testimony that's going to be played during trial. And I know there's at least a proposed joint instruction to that effect. And so, you know, courts have said sometimes you should identify who the witness is, and so the jury doesn't draw an inference from other witnesses. And so I think providing some factual specificity in that respect could make sense.

I think that the real difficulty is the more you go down that line, it leads to commenting on the evidence, and that's our concern.

THE COURT: So while you're reading notes from co-counsel, what if it is the case that the instruction says the witness has not been available after August 2014? I can't remember when the deposition was taken.

MS. SHERRY: 2014. I'm actually blanking on the date as well, but it was in 2014. I think that -- I don't -- I guess I'm not sure if that solves the problem you're identifying in terms of who to attribute the inference to.

Another way maybe to do it so it avoids the Court commenting on the evidence is to say something like Columbia alleges -- put something in the instruction so it's not coming from the Court, it's coming from the party. It's a little maybe odd to do that because it's a third party argument, but that might be one way to frame it where it doesn't seem like it's the Court instructing the jury on the evidence.

THE COURT: Okay. All right. So I'll hear from the other side. Thank you.

MS. SHERRY: All right.

MR. GUZIOR: Thank you, Your Honor.

I think where I would start is the issue has now been briefed and argued many times. We hear that Norton is unhappy with the conclusion, but we're unsure what the avenue is for the continuous reargument of the issue. It's the law of the case. It's decided.

THE COURT: I mean, to be fair, they're raising it in the context of jury instructions. So they're creating an appellate record. So that's not -- I don't have any problem with that.

MR. GUZIOR: That's fair, Your Honor. I just want to make the point that they decided to raise the jury instruction in the context of a motion in limine. And we had said this is a jury instruction issue, and they said, no, it's not. We're going to file a motion in limine. We want it briefed and decided now. And the Court decided the issue as Norton requested. They then filed a motion for reconsideration, which the Court properly denied the same day that it was filed. And I think what we're hearing is a second motion for reconsideration on whether the instruction should be given at all. And we think that it should be given, Your Honor.

We do think that this is an exceptional case.

Dr. Dossier was not only willing, but quite happy to come to trial to support Columbia's case, to speak out against his former employer. As the Court knows, the one thing that Dr. Dossier did tell me was he was quite concerned for himself that he would face consequences from Norton if he did that admirable thing that he was willing to do. And that's exactly what happened, Your Honor.

And I think it's -- I forgive our new colleagues for maybe not knowing the record fully, but I think it's surprising to hear that Norton had nothing to do with this.

And setting aside Your Honor's good observation that the actions and knowledge of a party's counsel is the action and knowledge of the principal in typical cases. Norton was directly involved in giving Dr. Dossier what I call the bear hug that scared him. And what I'm referring to is Exhibit 9 to Norton's motion for sanctions where on the 10th of April, 2020, David Majors, who is senior counsel of litigation at NortonLifeLock, said, "Mark, my name is David Majors. As you may recall, I am in-house litigation counsel at NortonLifeLock, Inc., formerly known as Symantec Corporation. We spoke several times in the 2014 time frame. I recently

learned that you sent some emails to Hugh Thompson regarding whether NortonLifeLock counsel at Quinn Emannuel continues to represent you in this matter. I want to confirm that they do in fact continue to represent you related to this matter. Please let me know if you have any questions. And if contacted by anyone in connection with this matter, including counsel for Columbia, please direct them to Dave Nelson and Nate Hamstra at Quinn Emannuel."

And Dr. Dossier, Your Honor, in response to that email, copied me and said, "You need to speak with Mr. Guzior."

Dr. Dossier then sent me an email that Your Honor has had in connection with the sanctions briefing saying, "I copied you because I wanted to prevent this kind of interference."

And I felt badly when this email was sent, Your Honor, because this man was going to come, speak out against his former employer, and support our case, and he said the one thing he didn't want was contractual trouble from his former employer. And I felt like I had put him in the situation where that was what he was getting.

Now, I don't know what happened after because a motion for sanctions was filed that threatened my

livelihood at the start of a pandemic, which was a great experience. And I don't know what Norton did or did not say to Dr. Dossier. All I know is they put a shield down, and that shield has been down until two days ago when Norton filed its objections to the jury instructions saying, Well, why hasn't Columbia contacted Dr. Dossier?

And in that respect, I'd like to raise that on March 22, after Your Honor's ruling finding that Quinn Emanuel had a conflict issue, we wrote to Quinn Emanuel to see if there was some way to fix this situation and perhaps even get Dr. Dossier to trial. And I said, writing to Mr. Hamstra, please provide answers to the following questions: Who does Quinn Emanuel claim to represent presently; Norton, Dr. Dossier or both? Two, does Quinn Emanuel object to us contacting Dr. Dossier to provide him with a copy of the Court's opinions that purportedly contained his "confidential information"? And if so, on what basis? Three, on whose behalf was Quinn Emanuel acting when it made filings and sent communications last week, yesterday, and today; Norton's, Dr. Dossier's or both parties? Please answer these questions today.

And you know what the answer was to this email, Your Honor? Nothing. We did not receive a

response on the 22nd of March, and we have not received a response even sitting here today.

So the idea that Columbia has somehow rested and not sought to contact Dr. Dossier, it's because we want clarification. The last thing I want is the people from Quinn Emanuel running into the New York State Bar Association saying I'm continuing to have contact with a represented party. We sought clarification.

And maybe on the 22nd of March, we could have gotten back in touch with Dr. Dossier in Saudi Arabia and tried to fix this mess. But we can't do that now, Your Honor, with the trial starting in a matter of days. We have to get ready for trial. We can't try to get in touch with Dr. Dossier in Saudi Arabia, get him to fly over here to come to trial.

Norton has made him unavailable, Your Honor. It's not Quinn Emanuel. You saw from the email I read to you, Exhibit 9 to the motion for sanctions.

THE COURT: All right. So I'm going to interrupt you, Mr. Guzior, and I'm going to ask you to -- those two documents, I want them made into physical documents and marked as evidence in this hearing.

MR. GUZIOR: Yes, Your Honor. I have copies

of the March 22nd email. We will have to get hard copies of Exhibit 9 to the sanctions motion. Would you like me to hand up the hard copies of the email now?

THE COURT: Yes, please.

MR. GUZIOR: Oh, I apologize, Your Honor. The David Majors email is Exhibit 9 to the opposition to the motion for sanctions.

THE COURT: So just give me the ECF number.

MR. GUZIOR: ECF 547-13.

THE COURT: All right. I'm marking -- you just gave me four copies of the same document. I'm marking the Tuesday, March 22, 6:58 p.m. email from Dustin Guzior to Nathanial Hamstra, Alexander Gross, Christopher Graham, and Jessica Ecker asking the questions that counsel just indicated on the record. So that will be Exhibit 1 that's entered for plaintiff in this hearing.

(Plaintiff's Exhibit No. 1 is admitted into evidence.)

MR. GUZIOR: Thank you, Your Honor.

THE COURT: Do you all have copies?

MS. SHERRY: Yes.

THE COURT: Okay. I'll keep one. And I'm sorry, the ECF number is?

MR. GUZIOR: 547-13.

THE COURT: All right. We're going to see if we can print out a copy just so we're all talking apples to apples. I'm a paper person.

MR. GUZIOR: I am, too, Your Honor. I had to grab this laptop. And I apologize. We didn't expect it to come up today.

THE COURT: No, that's fine. I want it separately entered as an exhibit in this hearing. I think it will be a better record.

All right. Please continue.

MR. GUZIOR: So, Your Honor, we think that this is an exceptional case. We appreciate Ms. Sherry's comments that there is a warning at the bottom of the model instruction. We think this is an exceptional case where a missing witness instruction is warranted.

Norton clearly had a degree of control over Dr. Dossier to appear and not appear, depending on what they thought was in Norton's best interests, exercised directly through Norton's in-house counsel David Majors, and exercised through Norton's representatives at Quinn Emanuel.

Columbia has tried hard to remedy the situation that Norton created, but we can't fix it

now. And so we think the missing witness instruction is appropriate.

On the question of Norton's direct involvement in what happened with Dr. Dossier, Your Honor, we also would like to point out that on the 15th of March, the Court ordered Norton to disclose certain communications with Dr. Dossier.

On the 16th of March, which was the due date for the disclosure, Norton filed a notice - Norton, not Quinn Emanuel - saying we are going to defy that order. We're not going to do it. That's contempt.

And as we learn in Remedies in law school, if you disagree with the Court order, you can file a motion for reconsideration, you can take other action for review, but you don't have the choice not to comply, because that is called contempt. And they have been in contempt every day since the 16th of March.

Now, why do I bring that up? Well, because we would like to know what those disclosures would look like to respond to Ms. Sherry's arguments, because we don't know to what degree Norton itself was directly involved in communications with Dr. Dossier after the conflict arose, and we don't know what it is that Dr. Dossier did or did not say to Quinn Emanuel

after the conflict arose.

And so, Your Honor, we believe that the evidence, Exhibit 9 to our opposition to the motion for sanctions, shows that Norton was directly involved. And if Norton would comply with the Court's order for March 16, we may have additional evidence.

Now, on the content of the missing witness instruction, Your Honor, Your Honor was correct. With regard to both the requested placement in the trial of the missing witness instruction and the content, our concern is that the jury understood to what witness the instruction pertained.

We thought that proximity to the playing of the videotaped deposition of Dr. Dossier in addition to a reference to the fact that the instruction was pertaining to Dr. Dossier would avoid confusion among the jurors and avoid prejudice to Columbia.

Indeed, Norton's proposed missing witness instruction perversely would convert the instruction into something that appears to be a net positive for Norton.

We have suggested what I respectfully submit is a tame version of the missing witness instruction on ECF 1048-1 at page 11, Columbia's proposed jury instructions No. 21, where the only reason we have

added the first paragraph is so that the jury understands that this instruction pertains to Dr. Dossier.

And I would add, Your Honor, that in addition to potentially confusing the jury about whether Columbia should be faulted for failing to call Dr. Dossier, we also have concerns that this instruction without context could be misinterpreted by the jury to apply to other witnesses. For example, the third named inventor on the '115 and '322 patents, Stylianos Sidiroglou, who is at MIT and has suffered extremely serious negative health events and cannot appear at trial for that reason, nor has Norton requested that he appear. And we're concerned that Norton would turn a generic missing witness instruction into a sword to try to suggest that the instruction was directed to the third inventor or any other witness who does not appear at trial.

So to conclude, Your Honor, we think the instruction is appropriate, and we think that the proposal that we've put forth for jury instruction No. 21 gives the jurors appropriate context and avoids prejudice to Columbia.

THE COURT: All right. Thank you.

MS. SHERRY: Thank you, Your Honor. I just

want to address a few points that came up. Let me start with Exhibit 9, since that's where the argument started. I read this exhibit several times in the last couple of days. It doesn't say --

THE COURT: I don't have a copy of it yet.

MS. SHERRY: I have a clean copy. Do you want me to pass it up?

THE COURT: Yes.

MS. SHERRY: I don't have an extra for myself, but I do have a copy.

THE COURT: I have one now. My deputy clerk is ahead of me.

MS. SHERRY: Okay. I'll take it back so I can --

THE COURT: We're going to mark this as an exhibit too.

MS. SHERRY: Absolutely. So looking at what was Exhibit 9 at the time, this is from in-house counsel for Norton, but you have to look at what it says. There is nothing in this email that says don't testify, we don't want you to go to court. Anything having to do with what is truly irrelevant for the type of control you need for a missing witness instruction.

It is focused very specifically on the

question that Dossier raised in the November emails in terms of whether he is still represented by counsel. That is the question that is being answered there. It does not show the degree of control or any attempt to keep him from testifying at trial. So that's my point on Exhibit 9.

THE COURT: Well, obviously, their point is that Dr. Dossier said this is what I wanted to avoid when he --

MS. SHERRY: Yeah, so I want to talk about that, too. If you give me one second, I just want to grab Exhibit 7, which we talked about too, which is the April 10, 2020, email that was discussed. And I have an extra copy, I believe. I can pass this up if you don't have a copy.

THE COURT: All right. We'll mark that as -- I don't know. Whose exhibit, plaintiff or defense? That's a question. Whose exhibit?

MS. SHERRY: It can be our exhibit.

THE COURT: Okay. It's Defense Exhibit 1.

(Defense Exhibit No. 1 is admitted into evidence.)

MS. SHERRY: So I think part of this email chain that maybe wasn't read to the Court is Dossier's response. And this is the Friday, April 10, 2020,

email, 2:05 a.m., starting with "Hi, Dustin." And what it actually says in the third paragraph is "I won't say that they have tried to discourage or direct my participation so far."

And if you look back at the November emails that Dossier sent to the company asking whether or not he was still represented and talking about not wanting to create trouble, what he was focused on is whether there was any sort of contractual employment agreement that would inhibit him participating in this manner.

And not to jump back and forth between exhibits, but to the extent Exhibit 9 was the company responding to his initial inquiry in November, it doesn't point to anything -- any employment agreement, contractual agreement, or anything else that would inhibit him from participating in the matter.

So I think looking at all those pieces together, there's nothing in there showing that Norton, you know, in those communications said anything to Dossier to try to control him or prevent him from testifying at trial.

The other main point I wanted to address is sort of the more recent timing.

THE COURT: Well, let's go back to the April 10 email. And so Dr. -- is it Dassier or

Dossier?

MS. SHERRY: I'm told it's Dossier, but someone else can correct me if I'm wrong.

MR. HAMSTRA: I think it's Dossier.

THE COURT: Dossier. All right.

So to the extent that Dr. Dossier is told whether or not he's represented, he's told to contact Dave Nelson and Nate Hamstra. Those are Norton's counsel, identifiably. And, you know, David Nelson was the person who defended his deposition. David Nelson is the person who is the lead counsel for Norton.

MS. SHERRY: Absolutely. And that just goes back to the joint representation issue. I took my friends on the other side to be trying to suggest that this Exhibit 9 email from -- or even if we look at Exhibit 7 email, but the Exhibit 9 email for Norton --

THE COURT: You have to use the new numbers. That's part of the reason I'm numbering them is because we're going to mess them up. So if you're talking about the April 10th email, it is Plaintiff's Exhibit 2 here.

MS. SHERRY: Okay. There are two April 10ths. So the one from Norton.

THE COURT: I'm sorry. The April 10th email

that is the email chain, is that what you're talking about?

MS. SHERRY: Well, no. I think you're right. So Plaintiff's Exhibit 2, if I'm correct, is the email on April 10th, but it's the one from David Majors. Is that right?

THE COURT: Yes.

MS. SHERRY: Okay. So what I took Columbia to be saying is to be using this particular email to say, look, Norton was the one controlling what Dossier did or telling him not to testify or what have you, and my point was just that that's not what the email says.

And then with respect to the fact that he's telling them to contact counsel for -- you know, contact Quinn, I think that's just in the nature of the joint representation. The point being that he was responding to the question from Dossier, "Am I still represented by the same counsel from the 2014 deposition?" So it's just answering that question.

THE COURT: That is Norton's counsel. So you're saying Norton has no responsibility. So Norton is not -- there's no action made by Norton through its lead counsel or through its in-house counsel?

MS. SHERRY: Again, I want to separate out

two points. I don't think this is a broader sort of question of responsibility. It's very specifically focused on what the standard is for the instruction here and what the courts look to as to whether there is a unique relationship between the party, Norton, and the witness such that the party is exercising control over what the witness does.

THE COURT: So my finding, I think, was that there was a peculiar relationship because Norton was doing that through the same counsel, the very same people.

MS. SHERRY: And so what you've actually said in the decision is that there was a peculiar relationship, but the peculiar interaction was between Quinn and Dossier.

THE COURT: From someone at Quinn who also was talking to someone at Norton in the very same time frame, the same lawyer. So you are saying that Norton can absolve itself of any responsibility for what David Nelson does because they send Dr. Dossier to David Nelson, but then David Nelson says, "We represent you," and perhaps says, you know -- so, first of all, let me say no one is or most folks are not quite dumb enough to absolutely say in an email "you can't testify." So that's one thing.

So this email from in-house counsel, I think that there are reasonable inferences that can be drawn from it, and I think that that's what Dr. Dossier drew when he said "I was trying to avoid this kind of interference."

But my issue is I don't know -- sir, do you want to just argue this?

MR. LUMISH: I'm sorry, Your Honor. No, I do not. I apologize.

THE COURT: You can give her hints. It's just pretty unusual. Go ahead and give her the hint.

MR. LUMISH: I apologize, Your Honor. I will sit down.

MS. SHERRY: Your Honor, I understand what you're saying, and I don't want to belabor this point too much. Just looking at that same email chain, and this is Defendant's Exhibit 1 from today, so this is jumping back and forth a little between these two.

THE COURT: That's all right.

MS. SHERRY: But when -- I want to focus on what the email says as opposed to characterizations of the email. What Dossier says in response to -- well, actually, let me back up. What happens in this email chain is that, you know, there's a reach out to Dossier from Quinn. Dossier responds and CCs Sullivan

& Cromwell on it. Sullivan & Cromwell separately responds -- I think it's the next one up -- to Dossier. And what's in that response is counsel's characterization regarding whether it's proper to discourage or direct your participation. There's nothing intervening between the two that says that that's what happening. And then Dossier's response, which is where I had started, is that "I won't say that they have tried to discourage or direct my participation so far."

So I want to, you know, just focus on what that says. The other part of this chain, since we're looking at this, is this may be a side point but I think an important one, if you look at the email that Dossier initially sent, and I think Your Honor maybe focused on this in the decision when you said that it's clear that --

THE COURT: Now, you're going a little fast, and so I need to keep up with you. I'm sorry.

MS. SHERRY: Sure. Just one other part while we have this chain out and we're looking at it, and I think Your Honor focused on this in the motion in limine decision on page 8 where you said it was crystal clear that he was willing to come and testify during the pandemic, you know, to travel to New York

to testify during the pandemic. And just to -- I think this is what Your Honor was relying on, but just to focus on the language in that February, April 10, and this is the 1:39 a.m. email, what Dosser says regarding his willingness to testify at this time. So this is April. This is a month in. "As a follow-up, I had indicated that I had no problem to come repeat my testimony if needed." And then the next paragraph says, "A coronavirus pandemic and a travel ban later, things are on hold, and I have no idea how things will unfold. As of now, clearly, New York would not be my favorite travel destination, but hopefully things would get better soon."

So that's the context in which, you know, this conversation is happening where he said, I had indicated that I had no problem testifying, but, you know, things are somewhat different now. We'll see what happens.

I want to -- I don't want to transition if you want to talk more about that, but I do want to focus on something else that came up during the prior argument, which is fast-forwarding a bit to today. And this is, you know, what has happened in March, and I think it goes to whether Columbia could have or should have done something sooner to try to get any

additional testimony from Dossier before the jury.

And I believe this is the March 22 email, and I'm guessing that's Plaintiff's Exhibit 1 today. So that is on March 22. And I believe counsel said, you know, had we gotten an answer to that March 22 email, we could have reached out to Dossier. We might have been able to get him to come testify today. But just to go through the timing a little, so that was on March 22. I believe on March 25th, Quinn filed something with the Court saying they are working on withdrawing from representing Dossier.

THE COURT: I'm sorry. Say that again.

MS. SHERRY: I believe -- so that was March 22, the email chain. I think it was on March 25 Quinn filed something with the Court saying, We are working on withdrawing from our representation of Dossier. And then on March 28, Quinn filed papers with the Court saying, We have withdrawn from our representation of Dossier.

So starting on March 28th, six days later, Columbia was absolutely free to contact Dossier and to ask him to come and testify at trial. So that's sort of that time frame.

Going back, I had also made the point that from at least October 2021 onward, they absolutely

could have used discovery tools to try to depose him again. I don't think they responded to that. I don't think there was any attempt to do that. And especially when what we're talking about here is, you know, there is already testimony. The gaffe that everyone seems to be focused on are these conversations that happened a few years later.

It would not have been all that difficult to supplement the deposition testimony. That is something that can be done. It's certainly something that would have been worth trying. And I don't think there's any indication that efforts were made. And so while, you know, I don't want to be in a position of pointing fingers or what have you, but we are at a place where we're --

THE COURT: Well, I tell you, that's all you're doing. Norton is pointing fingers at Columbia and at Quinn Emannuel. That's all Norton is doing. Norton is saying, you know what? Our lawyers don't really -- somehow we didn't know that there was some problem, even though you wrote in an opinion you're not making that finding yet, we had no idea these same lawyers could be a problem when I made a finding saying I'm not deciding that. And the whole record in that opinion, in that hearing, was about a conflict.

That was the whole thing.

And here, on March 16, I ordered that you all submit records of communications. And you say, Norton says, through David Nelson, Nina Tallon, and Richard Erwine, signed by Dabney Carr, you say the Court's order outside of the parties' adversarial process on an incomplete record, a one-sided record, and without basis in fact or law, sua sponte raised a potential conflict of interest between Quinn Emmanuel's representation of Norton and its representation of Dr. Dossier as a basis for my findings in motions in limine 5 and 6.

Thus, rather than ruling on the issues actually presented by the parties, the Court then ordered that counsel for Norton must disclose on the record, in writing, any information garnered from Dr. Dossier during the period of their representation of Dr. Dossier when it was a conflict.

And you respond - by that, I mean Dabney Carr, David Nelson, Nina Tallon, and Richard Erwine - "The Court's order demands a disclosure of privileged communications between Quinn Emannuel and its client, Dr. Dossier." Despite -- and he did write, which I addressed in my opinion, his sworn declaration that he is represented by Quinn Emannuel and has been so

represented throughout this litigation. And that I have exceeded my authority, especially because Dr. Dossier is not a party before the Court.

So this is the issue. Norton, through the same counsel, the actual same human beings, says that they do represent Dr. Dossier when they don't want to produce him and -- or information from him. And they say they don't represent him when it is the case that they're going to get in trouble. And it's just facial bad faith.

And so I think that if you think you're not telling me I need to strike Quinn Emannuel or sanction them in some fashion, I think you're not being forthcoming. If that's what Norton wants, but it's the very same people. And you can't step back from that. You just can't.

And so I make a finding, and you say, okay, March 28th, before a trial that starts 14 days later in a case that has been pending for eight years and gone to the federal circuit twice, that based on the conduct of counsel, Columbia, it lays at their feet to try to get this witness that has been obscured from them, kept from them, for years to scramble and get it done despite any action by counsel that is less than -- I'm trying to avoid these words -- good faith.

It's less than good faith.

MS. SHERRY: And I would -- I mean, to the what's the right remedy point, which I know we talked about a lot before, and I think I said it before, I think sanctions -- based on Your Honor's findings, sanctions against Quinn would be the more appropriate remedy as opposed to what -- you know, the recent letter. I would cede the podium in terms of, you know, more details, but my understanding is it was an assertion of attorney-client privilege with respect to the relationship between Quinn and Dossier.

And then, you know, we can put the March 28th to today date range to the side. I still think there's a longer time here. If the objective is to get Dossier to testify at trial and to have the jury hear not only what's going to be before the jury, but the later conversations, there were ways to make that happen, and --

THE COURT: You've said that. So I get it. You're saying they could have done it months and months ago, and that Norton successfully sat on its hands not addressing the conflict issue, and so shame on Columbia. I hear what you're saying.

Why isn't the remedy to strike Quinn altogether? Why should a company that had -- a law

firm that had a conflict for a very long period of time who chose not to address it, even though the Court identified it, and who told improperly, incorrectly, falsely, that particular witness, who has been a big issue in this case, that he was represented by Quinn Emannuel, even though there was no such finding -- and he didn't just say he was represented. He said, "I said he was represented." Now, I can tell you, I find that appalling.

So why is it the case that this law firm should still be -- if you're saying, Listen, Norton had nothing do with it, it's all Quinn, I'm struggling with that, I'll tell you. Because it's all the same people. And, you know, I'm not stupid. It's all the same people.

There is no pretense of creating noncommunication or separate groups that deal with things. There's not even a pretense. So I don't know how that doesn't inure to the knowledge of Norton.

But presuming what your position is here, why would I let that law firm still participate if Norton is saying, Go ahead and sanction them?

MS. SHERRY: I know you commented about my colleagues coming up with notes before on that question, because I am not going to be the one trying

the case I am going to cede the podium so we can actually give you --

THE COURT: All right. What we're going to do is take a recess. I don't mean to be too particular about going back and forth. And I do appreciate that you're probably a partner at the firm. Are you?

MS. SHERRY: I am.

THE COURT: That folks get an opportunity to argue things that I wish more firms did, that they gave different people opportunity to argue different things. It is problematic if it is too much back and forth, and I'm also taking into account that you all have been in the case for what now? Five days? So I'm not trying to be too demonstrative about that, but I will tell you it's extremely distracting. And usually in our court, we're super formal. We don't walk around without permission from the Court. You ask permission. You say, "My counsel wants to reach me." It goes on the record.

You know, Judge Merhige wouldn't let you talk if you didn't have your jacket buttoned. That's how I was raised. So I don't do that. I don't look at you and say "I can't hear you," which is what Judge Merhige did.

But I think I'm going -- what we're going to do, it's been a long time anyhow. My poor court reporter. We're going to take a recess still 12:30. And I'm going to allow you all just to take into account the discussions we've had, and I will look at these documents.

I do want you to know that there is not a small amount of truth in the fact that I have ruled on this repeatedly, and I know this is the first time you've taken a shot at it, your firm, but it's not your client's first time. And, you know, probably all along rational arguments might have prevailed, but this is a problem. I've never had the feeling that a company hid a witness and was untruthful to the witness about what I said about it.

MS. SHERRY: I understand.

THE COURT: I don't -- I've been in trial litigation a long time. I've never seen it. Never.

All right. We're going to take a recess before I keep talking.

(The hearing resumes on the next page.)

THE COURT: All right. So I realize we actually had a lunch time and I'm so unaware of time passing that I did not give you a full lunch break. And if you folks need it, I'm happy to do that. I'm not sure what else is going on much beyond this.

I welcome to hear any final comments that you-all might have. As you can see, I'm troubled by what is happening here. And I'm troubled by what has happened. And I'm looking for a just solution.

So it is -- this is -- so I have one -- you wouldn't say this. I have Latham arguing on behalf of Norton that Quinn, who represents Norton, should maybe -- that's not your first argument. You want to get rid of the missing witness thing. Maybe you should have some consequence because it's clear I am troubled by what has happened.

I feel so sorry for Mr. Hamstra. I don't know why he's the only Quinn lawyer here. He is in the thick of it, but there are a lot of other people who could be sitting here and I don't know why they're sending just him.

So I want you to know, Mr. Hamstra, none of this is personal to you. It's not.

MR. HAMSTRA: Thank you, Your Honor.

THE COURT: And I see the circumstance you're in

which, frankly, is even more bothersome on Norton's behalf, on Quinn Emanuel's behalf.

So I am not going to tell you that the missing witness instruction is not extraordinary. I know it is. I am facing an extraordinary litigated situation, and I want to try a just case. I have been saying for years now just try your case. Just try the case you have. Stop monkeying around. It's not to your client's benefit. It's not to the Court's benefit. It is not to the benefit of the justice system.

And I'm clearly expressing frustration, and so I don't want that to drive any decision I make. It won't, but if I keep talking I might get revved up because Mr. Guzior is right. I've hit this issue so many times. It is the case that initially Columbia said this is an issue for jury instructions. And Norton said, nope, we want a motion *in limine*. And then we had a motion *in limine*, and then I ruled and then we had a motion for reconsideration, and I ruled again and here we are again.

So my focus, I would have to say, is on the remedy. So it is possible that an instruction in the middle of testimony is too much. I do think it breaks up testimony. I'm not sure I've done that before. And I just want the case to go forward about what the case is really about, but you are not going to convince me that

Norton had no knowledge what was going on when these very same lawyers - sorry, Mr. Hamstra, - but some of whom have been in my court ever since. Mr. Nelson all over it, Mr. Erwine all over it. And I'll tell you, this may be the first time I have ever called out any attorney by name in the history of being a Judge. I am so aware of how it matters that we keep a collegial relationship with each other.

And when I first became a Judge, I didn't realize how much it mattered what you said in your opinions or what you said out loud because lawyers do hear it as a professional commentary, which is why, Mr. Hamstra, I'm saying it's not a professional commentary. I know you're here doing your lawyerly job. But it's unjust, and I need a proper remedy.

I think it is the case that Norton knew because the same lawyer was talking to them and was talking to Mr. Dacier. I don't know how that doesn't flow down to Norton being involved. So I think as far as the missing witness, I'm aware it's unusual. It's usually the plaintiff not showing up. I've read the cases. But I clearly am flummoxed by what is happening here.

And, you know, you all are such good lawyers. I can't believe we're in this circumstance. So I'm going to ask you all -- I'm going to give you an opportunity to

speak to me about possible remedies.

You know, people appear in this Court *pro hac* because I let them. I sign you in and I can sign you out. This is not behavior that normally happens in the Eastern District of Virginia, and I've never had that thought cross my mind.

So if you-all have anything you want to add, I think go ahead and do it. I'm not going to rule today because I don't want to rule without having a good thought and reading cases and following the law and the facts that I have in front of me. But whatever it is that you have to add, I'll hear it now.

MS. SHERRY: Your Honor, I don't want to take more of your time and, you know, we can go back and talk about remedy, like you said. I just wanted to maybe briefly address it, but then just say one other thing.

You know, first, I think we took a recess because you had asked me a question about striking, you know, Quinn as representation in the case, and that is what I went back to consult and, you know, come back to you on and I didn't want to leave that hanging.

THE COURT: Sure.

So I'm sorry to interrupt you, but if you can move the microphone a little closer to you.

MS. SHERRY: Sorry. My voice is leaving me,

too.

THE COURT: Well, if you can hear yourself outside then it's working. I'm just hearing you normally, which is fine, but it can be tougher for the court reporter.

MS. SHERRY: Okay.

So I did take that back and, you know, if you think that -- that striking Quinn as counsel is an appropriate sanction for, you know, what Your Honor just talked through, and that would be very difficult, but we would be prepared to go forward with the trial as planned. And that would be far preferable to what we have been talking about all morning - the missing witness instruction.

You know, if Your Honor thinks it is appropriate to sanction Norton, I think there's other sanctions available, again, and far short of a missing witness instruction. Whether they be, you know, monitary sanctions -- you know, I sort of asked my colleagues what are the common sanctions. I didn't have time to do research for you on that, but I think monetary sanctions, we think sometimes shortening trial time, things to that effect. And so I don't want you to think we're being unresponsive to your request for an alternative to what really started today.

And then the only other thing I wanted to say, I mean, I thank you for your time. I know we started this morning where we weren't going to even do jury instruction arguments this morning, and I know this has a long history and that this is a tough issue that you've been living for a while now, and so I just appreciate you taking the time to hear us out on it.

THE COURT: Well, you don't -- this is my job. Doing my job eight times over, the same thing eight times over, you know, I don't run an assembly line, so that's when I started expressing concern.

But it is my job, and I do want us to have a good trial together. We're not going to not have a trial. There is no doubt that we are have having a trial, so don't worry about that. Whatever comes from this is going to be that in a trial. So don't worry about it.

MS. SHERRY: Thank you.

THE COURT: And I'll tell you also, I'm not going to shorten the trial because you-all asked for less time and they wanted more, and that would be a sanction against Columbia. Maybe I could give you another 27 hours. I'm kidding.

Thank you very much.

MS. SHERRY: Thank you.

MR. GUZIOR: I would button my jacket, but the

pandemic has been unkind to my torso.

THE COURT: So you know what used to happen, right? He would say, "I can't hear you," and people would talk louder. And he would say, "I can't hear you," and people would talk louder. And that would go on until some CSO -- look, the court reporter is shaking her head. The CSO would be gracious enough to quietly walk up and say, "Button your jacket."

But I can hear you, sir.

MR. GUZIOR: Well, Your Honor, first, you know, I took your comments to heart about sort of the things we say to each other matter. And, you know, I too am troubled that Mr. Hamstra is the only person who is sent here. And we get to know the people we spar with, and it's not about him only.

THE COURT: I presume everybody knows that, but I would like it on the record. So I presume that was true of you also.

MR. GUZIOR: On the remedy, what Ms. Sherry suggested does nothing to help us with the problem that they've created. We would have had a witness at the trial who was in the room when the bad thing happened, saying what happened, and that it was bad. And we're not going to have that.

And we're not going to have that because Norton

- Norton itself - and Norton acting through its counsel, Quinn Emanuel, took steps to make sure that wouldn't happen.

Now, maybe *pro hac* should be revoked, maybe monetary sanctions should be awarded as Norton is now suggesting, frankly throwing their counsel under the bus, Quinn Emanuel, but that's not going to help us in the case that we would have had.

And so my final comment on this would be Your Honor's ruling on the missing witness instruction is right: This is an exceptional case. And I want to set a motion aside for a moment and just look at the legal test. There is a peculiar relationship between Norton and Dr. Dacier. When they want him to show up, he shows up. When they interjected themselves into his plans to come to trial, even though he said in that email they haven't yet interfered, but I want to make sure they don't, a cone of silence fell around him and then suddenly, without evidence to support it, he's no longer coming.

And as Your Honor says, the direct evidence is rarely there. It's usually circumstantial.

And finally, Your Honor, why go into contempt? If what they said to Dr. Dacier was come to trial, and he said I've thought about it and I don't want to come to trial anymore, why go into contempt? So I think, Your

Honor, we do believe there is prejudice to our case because of what Norton chose to do. And we believe the missing instruction witness is right when you apply the legal test. There is a peculiar relationship. Dr. Dacier could come if they asked, and he's no longer coming.

Thank you, Your Honor.

THE COURT: All right.

MR. HAMSTRA: Your Honor, if I may say just a couple words on that point?

THE COURT: Sure. Of course, Mr. Hamstra.

MR. HAMSTRA: Again, I'm not advocating this argument on behalf of Norton, but just for when Emanuel has come up today. I want to just briefly note that, you know, for the reasons we stated in our motion for reconsideration, we don't believe that a conflict existed or that, you know, any sanctionable conduct has occurred.

That said, as we all set out in the motion for reconsideration, the normal outcome of a conflict in a joint representation is that attorneys must withdraw from both sides of that representation. We presented that to Your Honor, and she disagreed in denying the motion for reconsideration, but we --

THE COURT: Now, wait a minute. What I said was I didn't tell you you had to withdraw from both. I said you could withdraw from one or the other. And what I

expected is that you would withdraw from one, but I didn't say you couldn't withdraw from both.

MR. HAMSTRA: I understand. So when you're speaking about, you know, whatever we're referring to when you're referring to striking Quinn Emanuel, you know, in effect we thought that was what the outcome should have been.

And then just, lastly, if Your Honor does sanction Quinn or strike us from the case for whatever reason, we just would like an order setting out the basis for that just so we have something that we can take up to the appellate court to clear our name, if that is Your Honor's ultimate choice.

Thank you.

THE COURT: Well, that's unusual. Sounds like everyone wants Quinn out, including Quinn. This is the weirdest case I've ever had.

I want to make it crystal-clear, just like I made it crystal-clear that representation was not decided about Dr. Dacier, that it was not decided that Quinn had to stay in. I had no idea that Latham was coming in. I don't know why Latham came in. And Latham's counsel was correct in saying that it's pretty rare, and never for that counsel, that they get brought into a case for trial two weeks before trial.

So I'm going to require that each of you write on the record what the remedy you think is appropriate in this case. I'm going to ask you to address both if the witness and missing witness instruction is given, and if it's not.

In this unusual circumstance, I'm going to order that Latham file one thing and Quinn file something, also. And I'm going to order that you don't talk about what you file. I don't know if I can do that. Can I do that?

Go ahead and talk about it, I guess. But Quinn has to file something separately from Latham because this is now -- although it was an odd thing. We've had two hearings together, and it -- twice I've now heard Latham say something a little bit different than what Quinn has said. And I certainly can't go through a trial with that.

But if Quinn wants me on the record ruling, I'm going to have you on the record asking me -- I always go on the record. I'm not going to do it orally. But I'm -- and I'm on the record with the motion *in limine*. I am not shy of making a record. But I want you-all to submit to me what the remedy should be, and why, and the legal basis for it and then I will rule on it.

I honestly don't know what that does with respect to our timing. So it's 1:00 on Thursday. What do you all propose about timing, including jury instructions

and other things?

Just have a seat.

MR. BEENEY: Oh, I'm sorry.

THE COURT: No. That's okay. It's a habit.

MR. BEENEY: So I think we have -- and Your Honor was referring to the rest of the pretrial conference?

THE COURT: Yes.

MR. BEENEY: And I think we have some housekeeping, which will take a few minutes. We have Hosfield, and we have jury instructions, I think.

As to the jury instructions, we conferred, Your Honor, and I think what we think may be most productive is to take up Your Honor's offer to provide us with the draft, allow us to confer and see if we can't come to narrowing, if not eliminating, issues and then perhaps addressing it Monday afternoon? That would be our proposal.

And as to Mr. Hosfield, we can address that now, if the Court please. And as to the other minor issues, they can certainly wait until Monday as well. None of them impact the jury selection.

THE COURT: And the verdict form?

MR. BEENEY: And the verdict form as well.

THE COURT: Until Monday?

THE COURT: All right.

So the verdict form and the jury instructions we will do Monday afternoon. I'll give you drafts.

And so with Mr. Hosfield, I'll proceed as you-all see fit. Maybe you can put your arguments -- however it is you want to do it.

Do you-all want to address that today?

MR. BEENEY: We're prepared to move forward with that today. It, obviously, it is not something that must be done before Monday, but we could also do that on Monday if Your Honor would prefer.

THE COURT: Well, why don't we at least argue it and then we can figure out the timing of how things will go forward. So I'll hear about Mr. Hosfield.

MR. BEENEY: Your Honor, I plan to make a brief reference to Mr. Hosfield's deposition and his report, and have the two copies for the Court. And also -- also brief reference to some case law. With apologies, I only have one copy for the Court.

And I've handed the cases to counsel, Your Honor.

THE COURT: So, Mr. Beeney, as you're standing, I am -- it's really for my court reporter. So either -- I know you are gathering information, but maybe just finish your commentary at the lectern, please.

MR. BEENEY: Thank you.

So, again, thank you, Your Honor. So I think as Your Honor knows, the damage experts in this case for both parts of the case are Mr. Hosfield for Norton and Dr. Sullivan for Columbia. And the issue that we would like to address is whether Mr. Hosfield can comment on the level of reasonable royalty for the infringement of the two Columbia patents. Your Honor, both experts start their analysis with Norton's gross revenue. That is what Norton received for the sale of the accused products.

There is no dispute. Certainly Columbia does not dispute that there are noninfringing functionalities in those products; and, therefore, under established Federal Circuit law, economics and common sense, you need to apportion the value of the patents to the entire Norton product. We don't want, and would not be permitted, to have a portion of the entire value of the product because there are noninfringing functionalities in that product.

The way the Federal Circuit has repeatedly said to do that, and the way economists typically do that, is to go through an apportionment analysis. And both Columbia and Norton have done that.

You cannot get to what the level of a reasonable royalty is under these circumstances without the apportionment step. It's kind of like asking you to get

to the third story of a building without there being a first and second story. You just can't get there.

But Mr. Hosfield, with respect to the apportionment analysis, relied entirely on Dr. Jaeger. He -- if there's anything that's clear from his deposition, he bought what Dr. Jaeger said lock, stock and barrel without question.

And I'll just, if I may -- Mr. Hosfield actually got annoyed at me at the deposition because I asked him this question so many times he said to me I've told you so many times I am relying on Dr. Jaeger. But in any event, let me just show one place where I was probably of asking Mr. Hosfield more than once.

If I can direct attention, Your Honor, to the second tab under the binder, Page 61 of Mr. Hosfield's deposition, at Lines 6 through 9.

THE COURT: For what it's worth, I think the transcript is the first tab.

MR. BEENEY: I'm sorry, Your Honor. I've got a different binder.

THE COURT: That's fine.

Page 69?

MR. BEENEY: Page 61, Lines 6 through 9. Just those three lines -- four lines.

"QUESTION: But in using the percentages of

Those that you attribute to the patented. Inventions, was that all Dr. Jaeger's work?"

And the answers was: "Really quite simple. Yes."

And then just one other of the many references, Your Honor, if I can direct the Court's attention to Page 59, and I'm not going to read the whole context, but just Line 16.

"But I didn't do any of that analysis myself."

THE COURT: What page are you on?

MR. BEENEY: I'm on Page 59. And I was just reading a section of Mr. Hosfield's answers when we were talking about the apportionment.

THE COURT: Got it.

MR. BEENEY: And he says on Line 16 to 17: "I didn't do any of that analysis myself."

And perhaps even further, if we turn to Page 57, Lines 5 to 14, Dr. Jaeger -- excuse me, Mr. Hosfield admits that anything that Dr. Jaeger did, quote, flows through Mr. Hosfield's opinion.

"QUESTION: And in connection with that apportionment analysis, as you just described it in this case, do you take into account whether any of the asserted claim elements are found in the prior art?

"ANSWER: Again, as I told you when you asked me that a little earlier, I said Dr. Jaeger to the extent that they're included in Dr. Jaeger's analysis, yes, it would flow through my analysis as well because I relied on him for that."

Now, turning to Mr. Hosfield's report, Your Honor, the next tab. If I can just direct your attention to Page 42. And six lines from the bottom of the page, Mr. Hosfield talks about the fact that I understand from Dr. Jaeger that the technology of the patent in suit contribute only 1 percent of the value to SONAR/BASH. And that's the foundation for Mr. Hosfield's opinion.

In Docket 905 on March 21st, the Court ruled as a matter of law that Dr. Jaeger's apportionment to 1 percent, or .07 or .09 was out under Rule 402 because this 15 infringing attributes as compared to the purported 214 attributes in the Norton decision tree was done on 2019 data without any hint as to what that would have to do with the hypothetical negotiation at which the reasonable royalty as a matter of law must be determined.

So the 1 percent relied on Mr. Hosfield is out. And that was a major foundation for Mr. Hosfield's opinion.

Moreover, in Columbia's motion *in limine* Number 1, the Court excluded under 402 and 403 other data that

Dr. Jaeger relied on his apportionment. That is the percentage of SONAR/BASH blocks. Also something that Mr. Hosfield specifically cites in his report, and form the basis of the apportionment analysis.

I apologize for not having the transcript, but Your Honor may recall when we were here arguing the *Daubert* motions that counsel for Norton said that however Your Honor rules on the *Daubert* is what will happen is that then the experts will seek leave to revise their opinions to comply with the Court's orders.

Well, it's been 17 days since the Court ruled on these motions, and there's been no requests either to amend Dr. Jaeger's opinion or Mr. Hosfield's opinion. And I think the bottom line, Your Honor, is that without Dr. Jaeger's opinion, without apportionment which Dr. Jaeger can no longer offer, then Mr. Hosfield's analysis of what the reasonable royalty should be has to fall because you must have an apportionment analysis and now he no longer has one.

And it is not a step that you can substitute the other things that Mr. Hosfield has done: Calculating profit, and calculating allocation of profit, and which party should share in that profit.

You don't get to the things that Mr. Hosfield did until you apportion the revenue that's attributed to

the patented invention.

And I would respectfully submit that that's enough to rule that Mr. Hosfield cannot comment on the amount of a reasonable royalty, but if I may just very briefly walk Your Honor through other factors that Mr. Hosfield himself says are the basis for his opinion on Page 63 of his report. And going over from Page 63 to 67, Mr. Hosfield specifically lists seven factors that helped him determine the royalty that would come out of the hypothetical negotiation.

And so you start with the first, which is the relative importance of the patents, the patented technically to Symantec. And he talks about that that's a small portion of the benefits. But we've already addressed that. So factor number one is out.

Second, he talks about the availability of noninfringing alternatives. And I won't cite it to Your Honor, but in his deposition, that is Mr. Hosfield's deposition, at Page 151 Line 22 to Page 152 Line 8, with respect to noninfringing alternatives, Mr. Hosfield says I didn't do any of it. I'm not qualified to do any of it. I relied entirely on Dr. Jaeger.

And that then brings us to Your Honor's March 21st opinion at Docket 904 in which Your Honor ruled that Dr. Jaeger's noninfringing alternative argument

having to do with BPE is out for good and sufficient reasons. So the first two bases are you pulled out from Mr. Hosfield.

The third thing that Mr. Hosfield says at the bottom of Page 63 of his report is Dr. Sullivan's apportionment analysis adjusted. And what that means, if you look at Mr. Hosfield's report, is really just substituting Dr. Jaeger's apportionment for Dr. Sullivan's apportionment.

And that brings us to the next ground, which is the Snakeyes license on the top of Page 64 of Mr. Hosfield's report. And as Your Honor knows in Docket 900 on March 18th, the Court ruled that that was not a comparable license that was appropriate for an expert to rely on. So all four of the first four bases of Mr. Hosfield's opinion are out.

And then we get to the fifth, the commercial relationship of the parties. And certainly Mr. Hosfield can talk about that.

And then we get to the sixth, the total royalties Columbia earned from licensing any of its security-related patents. That also is out under Your Honor's opinion that the Red Balloon, the TCS Security and the other licenses were out in the same motion *in limine* order on March 18th, Docket 900.

And then finally, Mr. Hosfield relies on Symantec's investment in the development of SONAR/BASH.

So at the end of the day, Your Honor, anything that Mr. Hosfield has to say about apportionment is out of the case for good and sufficient reason. And as I've said before, once that apportionment is out, Mr. Hosfield has nothing to say about what the level of the reasonable royalty is because it is not only required by economics, it is required by Federal Circuit law.

And if I may just quickly conclude, Your Honor, I -- I always edit younger lawyer's briefs when they say court opinions are routine, but it is true that it is routine for courts to draw the line between one expert's opinion if it relies on excluded testimony of another expert, then the second expert's opinion is out.

And I will just cite a few cases to Your Honor, all of which I have handed up to Your Honor. And I have given copies to Norton's counsel. In *Apple* against *Motorola* in the Federal Circuit, quote -- and I'm replacing expert with names.

Quote, The second expert incorporated the first expert's testimony into her own once she relied on the proposed testimony to opine about damages. The substance of the first expert's testimony is now more reliable when admitted through the second expert than through the first.

And if ever I've seen a case, Your Honor, and I hope this is not hyperbole, but if I've seen a case that is on all fours with the situation that I'm addressing to the Court, it is the *M2M Solutions* decision out of the District of Delaware at jump cite seven where one expert's opinion, quote, Provides the foundation for a reasonable royalty analysis by a damages expert. Without the first expert's conclusion, that foundation crumbles and the damage expert's testimony must be excluded as well.

And we've given to Your Honor four other cases, including one from the Fifth Circuit that say exactly the same. The Fifth Circuit in the *Simms* case, since the District Court had already deemed expert number one's testimony inadmissible, it concluded that expert's two testimony was also inadmissible. The District Court properly excluded expert's two theory because it relied on expert's one inadmissible theory.

We have been through the record, Your Honor, and just do not see how Mr. Hosfield can probably comment on the reasonable royalty.

And just a final thought, Your Honor. You know, parties and their experts make decisions about how they're going to put together their reports, and they make decisions about what they're going to rely on. And this is, you know, a bed of Norton's own making. And to use

the expression, they now are forced to lie in it. And I just don't see how Mr. Hosfield could conceivably comment on the amount of a reasonable royalty.

THE COURT: Now let me just confirm. Are you seeking to exclude his testimony all together?

MR. BEENEY: No, Your Honor. He can comment on Dr. Sullivan's analysis, I believe. And, you know, he can comment on other things about Norton's investment in the technology. But in terms of with a number, with an adjective, or with anything else, commenting on the amount of a reasonable royalty, that simply can't be done because there is no apportionment analysis by Norton in this record.

THE COURT: So in your answer I want to be specific. I asked questions about certain factual contentions that were in the pretrial order, so one of the contentions talked about whether there were dominiums damages or -- I don't want to misquote it. Are you saying that those adjectives cannot be used?

MR. BEENEY: They can't, Your Honor, because you can't get there unless you apportion the value of the patented technology to the product. You just -- what the reason reasonable royalty should be is a complete and total black box until you determine what the value of the patents is to the product given the fact that everybody

starts with gross revenue. And without an apportionment, without the ability to say here is what the value of these patents are to the accused product, you can't comment on the royalty.

Now, I know in Your Honor's motion *in limine* ruling I believe Your Honor said that Dr. Jaeger could testify about the technology. And we're not taking issue with that. But that doesn't get you to what the Federal Circuit requires to apportion a number or a range or a value to the reasonable royalty.

THE COURT: I'm trying to look for the exact paragraph, but I understand your argument.

MR. BEENEY: Okay. Thank you.

THE COURT: You're saying, obviously, that Dr. Jaeger can't do the same thing?

MR. BEENEY: Correct, Your Honor.

THE COURT: Okay. Thank you.

MR. BEENEY: Thank you.

MS. TULL: Good afternoon. Can Your Honor hear me?

THE COURT: That's rough.

MS. TULL: It is. I apologize to everybody.

THE COURT: Are you well?

MS. TULL: Just a loss of voice from allergies.

THE COURT: Okay. Not a HIPA question.

MS. TULL: No, no. That's fine.

So, fortunately, particularly for my voice, I think this will be a short argument.

With respect to Mr. Hosfield --

THE COURT: Can you introduce yourself for the record?

MS. TULL: I apologize, Your Honor. Susan Tull, Your Honor, on behalf of Norton.

So we do maintain our objections, of course, to Your Honor's *in limine* and *Daubert* rulings, but we do recognize and abide by those orders. And in light of the Court's -- in light of the Court's rulings on the motions *in limine*, and *Daubert* rulings with respect to both Dr. Jaeger's apportionment analysis and the portions of Mr. Hosfield's report that were addressed by the Court and identified by counsel, we agree with the Court and with Columbia that Mr. Hosfield cannot present an ultimate damages number, and so he will not be providing the $1.5 million number that appears in his report, nor will he be saying nominal de minimis, or a related adjective.

THE COURT: Or, I'm sorry?

MS. TULL: Or a related adjective.

THE COURT: Okay.

MS. TULL: We do, again, maintain all rights for appeal. We will seek to make proffers of evidence outside

of the jury's presence.

Again, we do agree with counsel that there are other aspects of both expert's reports and opinions that were not excluded and that we will be presenting to the Court.

THE COURT: Right. Okay.

I understand that you-all are preserving your objections, but because they were in the factual contentions I just want to make sure we didn't have any argument.

You may have a seat, Ms. Tull.

Factual contention 17 of ECF 1076 says if Norton is found to infringe the '115 and '332 patents, Columbia is entitled to only a de minimis royalty.

So that's not going to be presented through testimony of any expert or even implied?

MS. TULL: Correct, Your Honor.

THE COURT: And I'm trying to look for the other one. Can someone help me? There were two. I marked up the old version. It's in my order, I think.

Well, with respect to the '643 patient, --

MS. TULL: If I may interject, Your Honor?

Mr. Hosfield did not offer an express damages number on the '643 patent. So we maintain our arguments and present evidence that Columbia will not meet its

burden of proof on damages. But there was, in that instance, no specific number that he was presenting. And it doesn't involve the same apportionment issues, I believe.

THE COURT: Right. I agree.

But Paragraph 34 says there's no support for the patent royalty approach. And even if applied, Columbia would be entitled to no damages for the '643 patent.

Is there any concern about how that comes in? That's Paragraph 34. I don't know how that comes in.

MS. TULL: I don't believe that's implicated by the arguments that counsel raised or the 1.5 or de minimis numbers, Your Honor. It's more an absence of showing the damage.

MR. BEENEY: Your Honor, I think any quantification, including none, is out. Certainly, you know, a lawyer can say to Your Honor in posttrial briefing as to what the burden of proof has been and whether it's met, but I don't see how you can have a fact witness who did not provide an opinion in their report as to what the damages would be to say none. None is a quantification.

MS. TULL: We will not -- and Mr. Hosfield will not be testifying contrary or outside the scope of his report. But certainly, Your Honor, we should be able to tell the jury that if there is no -- if there is no

liability, there are no damages as well.

So counsel's arguments with respect to Mr. Hosfield did not -- the motions *in limine* that he addressed, and the *Daubert* rulings, did not impact on Mr. Hosfield's opinions on the '643 report. And, again, we will certainly stay within the scope of his report.

THE COURT: Did you want to say something?

MR. BEENEY: I apologize, Your Honor.

As long as there's no quantification of the number, whether it be zero or otherwise. Again, we do believe that Mr. Hosfield is free to criticize Dr. Sullivan, but not, again, with adjective, range, or a number comment on the amount of damages.

THE COURT: So this is my concern is that if the phrase, even if applied, they would be entitled to no damages. So if the only basis for saying even if applied is that because they're -- they're not going to prevail overall, then that's fine. But as I read this in the first instance, I thought there might be some kind of alternate evaluation using their process. And so that's what I was trying to get at.

MS. TULL: That is not the case, Your Honor. It relies -- and this would not be coming through Mr. Hosfield. But it's solely the fact that the burden is on the plaintiffs in this case to prove, at least by a

reasonable basis, that they're entitled to damages and whether -- you know, we could argue whether or not they have met their burden in this case.

MR. GUZIOR: Your Honor, there's one other issue related to damages.

THE COURT: I actually think that as long as that is sort of the basis. So the problem is once you have an expert saying no damages, it carries weight. If it's a legal argument then it sounds like a calculation. If it's an expert -- and that's what I'm trying to work around. You can make a legal argument, of course. And my concern was who was going to be saying this.

So you're saying that no expert is going to say that, correct?

MS. TULL: Correct.

THE COURT: And that will be a legal argument that you present?

MS. TULL: Correct.

THE COURT: Go ahead.

MR. BEENEY: So this is another paragraph, Your Honor, because I think counsel's representation is pretty much where we are.

THE COURT: Okay.

MR. BEENEY: Nothing from the experts or the fact witnesses about a quantification of damages,

adjectives, range, numbers. But, of course, posttrial, counsel can make whatever argument they want to make as to whether we've met our legal burden.

THE COURT: Correct.

MS. TULL: And just to be clear, Your Honor, that would also include closing argument, is that correct? That we should be able to make that argument in closing to the jury, though it would not come in via an expert, for example, that they had not met their burden.

THE COURT: So you're going to argue that they haven't met their burden?

MS. TULL: Correct.

THE COURT: So I think it's fair argument to say that if you don't meet the burden then you don't collect anything.

MR. BEENEY: I guess off the top of my head, Your Honor, the only distinction that I think about is that while I think it's fair to say, you know, Columbia has not proved they they're entitled to $228 million in damages or 1.24 percent of the $17 billion in products that Norton sold, but the next clause, and therefore it should be zero, I do have problems with because there will be no evidence as to what the "therefore it should be" if the jury feels we haven't met the burden.

THE COURT: So you're saying if they use a

number, and then say they didn't prove that number, and so they should get nothing, that's different from saying that they didn't meet their burden. And so because they didn't meet their burden, they can't get any damages, is that right?

MR. BEENEY: Yes.

THE COURT: Do you-all object to making that distinction? It strikes me as close, but what do you-all think?

MR. LUMISH: If I may, Your Honor? I just want to be able to say to the jury we didn't infringe so we don't owe them anything. We didn't fraudulently conceal anything, so we don't owe them anything.

I think we should be allowed to say that there's no liability and no damages at all in the case. And that's, I think, what we're trying to protect here.

THE COURT: Right. I am perfectly fine with that. And this, again, may be an issue I raised in a different context.

But I do agree that making that argument right after a number feels a little different than just saying there's no liability and so there's no damages. So I would ask you to be mindful of that.

MR. LUMISH: We will, Your Honor.

THE COURT: All right.

MR. BEENEY: So just one other bit about the pretrial order facts, if Mr. Guzior may address that, Your Honor?

THE COURT: Of course.

MR. GUZIOR: Your Honor, I'm looking at Paragraph 13, ECF 1076, Page 36. And Norton says Claim 1 of the '115 patent represents an unasserted claim against which the alleged improvement in the asserted claims should be measured in calculating a reasonable royalty.

Now what they're getting at here is something called a noninfringing alternative. When you would say a system configured with the limitations of Claim 1, but not having the combined models limitation, is an alternative that is noninfringing and needs to be taken into account.

And as Your Honor knows from the briefing as to the infringement theory that Columbia has to present at trial, Dr. Jaeger offered one, and only one, noninfringing alternative which was take SONAR/BASH out. And at the deposition I gave him the opportunity to change his mind and said, Is that the only noninfringing alternative?

And as we put in the briefing, he said "Yes."

And we're seeing an entirely new noninfringing alternative in Paragraph 13, which is just configure the system as in Claim 1.

But Norton will not be able to show you any